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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL.,

Appellants,

vs.

ROBERT LaRUE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Brief For The Appellants

OPINION BELOW

The opinion of the District Court (App.) is reported at 326 F. Supp. 348.

JURISDICTION

The judgment of the District Court was entered April 7, 1971 (App.). A notice of appeal to this Court was filed on May 5, 1971 (App.). The jurisdictional statement was filed July 6, 1971, and probable jurisdiction was noted December 20, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

Does the First Amendment protect any and all *non-verbal* conduct (including acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation and flagellation) when the conduct is presented as purported "dancing" or "entertainment" and engaged in live or displayed by film on state licensed alcoholic beverages premises?

Where *non-verbal* conduct occurring on state licensed alcoholic beverages premises contains a communicative or "speech" element sufficient to bring into play the First Amendment, may a federal court require a State to restrict itself to *obscenity* as the only basis by which such conduct may be regulated or limited, or may a State proceed against such conduct regardless of whether or not the conduct is obscene, provided the State's enactments meet the criteria set down by this Court in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)?

May a federal court invalidate and enjoin the enforcement of otherwise valid State regulations by assuming that improper motives prompted such enactments?

STATUTES INVOLVED

The statutes involved are California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, sections 143.2, 143.3, 143.4 and 143.5). The text of these regulations is set forth in the Appendix attached hereto.

STATEMENT OF THE CASE

With the advent of so-called "topless waitresses" on state licensed on-sale[1] alcoholic beverages premises, and the

1. "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

progression therefrom to nudes, to live sexual acts and conduct, and to visual displays (by motion pictures) of such sexual acts and conduct, the State of California has experienced an ever increasing progression of public welfare and morals problems in connection with the operation of on-sale alcoholic beverages premises where such non-verbal acts and conduct are employed and permitted.[2]

Initially, while the situation was still in the "topless" only stage, the appellant Department of Alcoholic Beverage Control attempted to prevent the attendant and resulting injuries to the public welfare and morals by notifying such licensees to refrain from such conduct and undertaking to discipline the alcoholic beverages licenses of those who would not desist. Resultant litigation finally reached the California Supreme Court in the case of *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 465 P.2d 1 (1970).

Specifically pointing out that the hearing record before it contained only the sterile stipulation between the parties that bare-breasted waitresses were employed on the licensee's premises, the California Supreme Court held that there was no evidence in the record by which it could conclude that the evils the Department sought to prevent were related to the use of topless waitresses and, therefore, that the Department's disciplining of the license could not be sustained.

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2. The record below establishes that when certain non-verbal acts and conduct are permitted on state licensed on-sale alcoholic beverages premises that attendant thereto, or resulting therefrom, are various injurious consequences to the public welfare and morals, including but not limited to: overt and unlawful sex acts between employees and between employees and the public; "B-girl" activity in the soliciting of drinks; prostitution; sale, possession and use of narcotics and dangerous drugs; sexual crimes including rapes, attempted rapes, and indecent exposures; other violent crimes including assaults on law enforcement officers; intemperance; exploitation of alcoholic beverages customers; and serious and extensive law enforcement problems due to the increase in criminal offenses in and around such premises.

The California Supreme Court then set forth:

> "Finally, although it appears unnecessary, we point out that our conclusions have been reached on the record before us. We are not unaware of the public concern for proper regulation of premises licensed to sell alcoholic beverages. Our holding confers on them neither a general sanction to employ topless of similarly undressed waitresses nor a general immunity from the Department's disciplinary action in the event they do. If such purveying of liquor is in fact attended by the deleterious consequences which the Department claims, it should have no difficulty, in appropriate disciplinary proceedings, in proving them. In a word it should establish 'good cause' and make out its case. *Alternatively, the Department could draw upon its expertise and the empirical data available to it and adopt regulations covering the situation.*" (465 P.2d at 16, emphasis added)

Following the *Boreta* decision, and the intervening intensification of problems resulting from the steady progression of sexual acts and conduct on licensed alcoholic beverages premises, the Department—seeking to prevent the "deleterious consequences" from occurring, rather than merely disciplining licenses after such damage to the public welfare and morals had already occurred—proceeded in its quasi-legislative capacity[3] to hold legislative hearings and to secure expert opinions and the available empirical data whereby it could formulate and enact proper regulations for state licensed alcoholic beverages premises.

Thereafter, on the basis of California statutory law, officially reported decisions dealing with conditions resulting

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3. The California Department of Alcoholic Beverage Control is a "constitutional agency" of California state government and is vested with self-executing powers by constitutional grant. (California Constitution, Article XX, Section 22).

on alcoholic beverages premises when certain types of acts and conduct were permitted, several days of legislative hearings (involving the compilation of 703 pages of legislative hearing transcript and the receipt of over 67 exhibits), and review of the expert opinions and available empirical data, the California Department of Alcoholic Beverage Control enacted Department Regulations 143.2 through 143.5. Included in the aforesaid legislative hearing record and exhibits were the following pertinent facts:

(1) Alcohol acts as a depressant on the control centers of the brain which normally inhibit base behaviors, thus resulting in a release from inhibitions. Hence, persons consuming alcoholic beverages may and do engage in acts and conduct which they would not engage in if not drinking. (Defendants' Exhibit "A", RT 10:9 to 16:19; Defendants' Exhibit "B", Exhs. Nos. 2, 3, 4 and 5)

(2) An individual under the influence of alcohol is more likely to be sexually stimulated by viewing sexual acts, conduct and displays, and is more likely to engage in sexual activity on premises affording such stimulation than on premises which do not. (Defendants' Exhibit "A", RT 406:18 to 407:17)

(3) The presenting in on-sale alcoholic beverage premises of topless -bottomless, nude entertainment, sexual acts, sexually oriented conduct and visual displays (film) of such sexual acts and conduct has resulted in the following types of occurrences:

(a) Overt, improper and unlawful physical acts and conduct by the entertainer-employees and by, or with, the customers. Examples (all *RT* references are to Defendants' Exhibit "A", all *Exhibit* references are to Defendants' Exhibit "B"):

—oral copulation of girls by customers, RT 38:19 to 40:1; 41:12 to 41:18; 63:9012; 76:34; 97:1-20; Exhibit #6;

—masturbation by customer, RT 40:26 to 41:6; 64:20-21; 72:1-18; 109:22 to 111:22; 154:8-18;

—inserting money from customers into her vagina or rubbing money on vaginal area, RT 43:23 to 43:1; 151:25 to 153:11;

—placing cream on pubic area and customer removing same with mouth, RT 59:7 to 62:5;

—customers touching girl's genitalia, RT 63:9-12; 97:1-20;

—customers with rolled up currency in mouths placing same in girl's vagina, RT 63:15-20;

—customers using flashlights rented by licensees to better observe girls' genitalia, RT 63:12-15; 136:24 to 137:3;

—customers caressing girls' breasts, RT 63:20-21; 76:19-22;

—customers placing dollar bills on bar and girls attempting to squat down and pick up same with their vulvas, RT 75:17-23; 99:3-7;

—girls urinating in beer glass and giving glass back to customer, RT 75:23-25;

—girls sitting on bars and placing their legs around customers' heads; RT 76:2-3; Exhibit #6;

—girls placing their breasts in customers' beer, RT 76:19-22;

—customers grabbing, kissing and fingering girls, RT 77:19-25;

—girls taking customers' eye glasses and rubbing on their breasts and genital areas, RT 151:25 to 153:11;

—on sale premises serving hot dogs, girls ask customer: "with or without?", if customer says "with", girls rubs hot dog in her vaginal area before serving same to customer, RT 98:24 to 99:3;

—customers dropping and placing money inside girls' panties, customers unzipping girls' clothes,

girls rubbing customers faces in their breasts, girls placing their exposed vaginal area close to customers' faces, girls simulating masturbation with finger, customers kissing girls' nipples, customers' faces in girls' crotch areas, customers' mouth on girls' panties, RT 129:21 to 135:2; Exhibits 10, 11 and 13;

—girls placing own nipples in their mouth, combing their pubic area with customers' comb and asking customer to kiss comb, girls leaving stage and sitting on customers' laps with customers touching and sucking on breasts, RT 129:21 to 135:2;

—use of cucumber, dildoes, bananas, candles and other phallic symbols to simulate intercourse and other sexual activities, RT 159:13 to 160:2; 193:23 to 194:17;

—pouring beer between breasts and collecting same in beer glass held below the pubic area, RT 296:2-6;

and as to other acts and conduct see RT 33:4-11; 15-19; 62:6-12; 76:24 to 77:13; 89:1-14; 95:2 to 96:19; 139:10-20; 141:21; 155:11-19; 156:3-8; 173:16 to 174:2; 295:30 to 196:1; 302:21-24; 304:12-14;

(b) "B-girl" activity, soliciting of drinks. RT 79:9-13; 79:20 to 80:7; 82:1-10; 83:18 to 84:7; 85:15 to 86:1; 88:18-24; 151:25 to 153:11; 337:20-26; 345:21 to 346:7; 363:5-14; 540-541. Where in 1964, San Francisco was almost free of "B-girl" activity, topless-bottomless bars has resulted in "B-girl" activity reaching epidemic proportions, RT 79:9 to 80:7.

(c) Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms, RT 45:26 to 46:3; 53:13-17; 79:9-17; 82:1-10; 85:15 to 86:1; 115:16-26; 121:1-11; 125:21 to 126:17; 153:12 to 154:8; 154:19-23; 161:10-19; 173:16 to 174:2; 194:24 to 195:3.

(d) Sale, possession and use of narcotics and dangerous drugs in and around such premises; RT 54:7-10; 79:9-13; 84:8 to 84:9; 126:6-17; 161:10-19; 348:5-16.

(e) Other violent crimes in and around premises including shootings, robberies, assaults, kidnappings and murders, RT 79:9-13; 80:8-13; 87:22 to 88:13; 194:24 to 195:3; 355 to 356.

(f) Exploitation of customers, including charging $3 for a drink, soliciting the money for operation of coin-fed film projectors, soliciting money for jukebox, renting flashlights so customers can better observe girls' vaginal areas, etc., RT 80:20-24; 129:12-20; 138:12 to 139:9; 363:5-14; 63:12-15; 136:24 to 137:3.

(g) Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape, and rapes, RT 23:17 to 24:10; 111:23 to 113:8; 115:14-15; 125:21 to 126:5; 135:7 to 136:15; 151:6-19; 199:4-20; 267:16-25.

(h) Drunkenness and intemperance on such premises, RT 194:24 to 195:3; 300:9 to 301:4; 345:21-346:17.

(i) Minors on premises, RT 182.

(j) Serious and extensive law enforcement problems. On-sale premises offering such nude entertainment and/or films displaying sexual acts have very serious and extensive attendant and resulting police problems due to the crimes being committed on and around such premises. Availability of alcoholic beverages for consumption and the proximity of the girls to the customers in on-sale premises results in police problems not prevalent in non-licensed theaters offering such entertainment. The seriousness of the police problem increases and progresses as the entertainment offered progresses from topless to bottomless to the actual sex acts, live or on film. RT 22:22 to 23:14; 28:4-5; 33:4-11; 44:13-20; 44:24 to 45:7; 52:16 to 53:12; 54:10-15; 81:3-8; 85:11-20; 86:18-23; 87:5-14; 99:17-25; 108:14 to 109:10; 115:14-26; 120:11-21; 125:21 to 126:5; 149:8-18;

163:11 to 166:1; 166:21 to 168:26; 170:6-9; 169:6-11; 171:24 to 172:19; 186:18-26; 187:12 to 188:5; 194:18; 196:1-12; 265:8 to 266:15; 268:7-14; 269:9-17; 296:11-14; 297:22-26; 330:24-26; 342:16-26; 343:1-6; 347:2-5; 348:17; Exhs. Nos. 15, 16 and 17.

(k) Assaults on police officers at such premises, RT 113:9 to 115:10; 189:22 to 191:5; 299:21-24; 347:22-26.

(l) In addition, an examination of the hearing record and exhibits will demonstrate the extensive number of alcoholic beverage control violations and the conditions contrary to public welfare and morals which occur on premises offering such non-verbal acts and conduct. See specifically RT 534 to 616; 642 to 703; Exhibits 43 to 67. The films being shown on licensed premises, and included in the exhibits, show everything from actual sexual intercourse and oral copulation between persons, to intercourse between a girl and a dog, to a man defecating on a nude girl and rubbing his bowel movement all over her breasts and body.

Thereafter, the appellees, who are corporate and individual on-sale alcoholic beverages licensees (plus a few employees in *LaRue et al*), filed declaratory and injunctive relief actions in both the California state courts and in the United States District Court for the Central District of California. The actions basically sought to have the newly enacted regulations declared unconstitutional as in violation of the freedom of speech and due process guarantees of the First, Fifth and Fourteenth Amendments, and their enforcement by the appellant Department of Alcoholic Beverage Control and its officers enjoined. The California state courts (including the California Supreme Court and the California Court of Appeal) refused to stay the enforcement of the regulations and declined to hear the declaratory and injunctive relief actions. The federal District Court then proceeded

with the actions before a specially constituted three-judge Court.

On April 7, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Opinion and Judgment (App.) holding in substance that the acts and conduct proscribed by Department Regulations 143.3 and 143.4 are within the freedom of speech guarantees of the First and Fourteenth Amendments, that such acts and conduct could be proscribed by the State only upon proper proof of their *obscenity*, that the regulations were prompted by improper motives to circumvent *obscenity* proof requirements, and that the said regulations were therefore invalid as in violation of the First, Fifth and Fourteenth Amendments.

It is from that portion of the Judgment invalidating Department Regulation 143.3 in part and Department Regulation 143.4 in toto, and enjoining the enforcement thereof, which appellants have brought this appeal. (App. ....)

SUMMARY OF THE ARGUMENT

The instant regulations prohibit the holding of an on-sale alcoholic beverages license on premises which permit certain non-verbal sexual acts, conduct or visual displays. The State has done so because of the serious injuries to important state interests which attend and result from the employment of such conduct and displays on premises wherein the public is consuming alcoholic beverages.

The court below invalidated the regulations on the basis that: (1) conduct presented as purported "dancing" or "entertainment", either live or by way of film, is "speech" and is protected by the First Amendment; (2) First Amendment activity may be restricted by a state *only* upon proof that such conduct is *obscene;* and (3) the enactment of the regulations was improperly motivated by a desire to circumvent the standards of proof required to establish *obscenity.*

The non-verbal sexual acts, conduct and displays proscribed by the regulations do not constitute "speech" and are not within the protection of the First Amendment.

Assuming, arguendo, that such conduct or displays are within First Amendment protection, a state may not be limited to *obscenity* as the only grounds upon which it may restrict such activity. The instant regulations meet the criteria of *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

ARGUMENT

I. Live Acts or Visual Displays in Public of Sexual Intercourse, Masturbation, Sodomy, Bestiality, Oral Copulation and Flagellation; Public Display of Genitalia and Anuses; and Other Such Non-Verbal Acts and Conduct, Do Not Constitute "Speech" and Are Not Within the Protection of the First and Fourteenth Amendments

The California Department of Alcoholic Beverage Control regulations which were invalidated and enjoined by the court below prescribe that an on-sale alcoholic beverages license may not be held at any premises where certain non-verbal acts or conduct are permitted, including: (1) acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation and any sexual acts prohibited by state law, (2) display of genitalia and anuses, (3) touching, caressing and fondling of breasts, buttocks, anus or genitalia, and (4) visual displays (films or slides) of the foregoing acts and conduct.

The majority of the District Court found the regulations to be invalid on the basis that such non-verbal acts and conduct were presented within the context of live entertainment and motion pictures and therefore had First Amendment protection. (App.)

Such *non-verbal* acts and conduct do not constitute "speech" and are not entitled to the protection afforded speech by the First and Fourteenth Amendments.

While the protection afforded to verbal and printed speech has been expanded to encompass certain non-verbal acts and conduct engaged in by persons for the purpose of expressing an idea ("symbolic speech")[4], this does not mean that any and all non-verbal acts and conduct which allegedly are engaged in with the intent of expressing an idea are automatically "speech" and within the protection of the First Amendment. *United States v. O'Brien*, 368 U.S. 367, 376 (1968)[5]:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft."
>
> *We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."* (emphasis added)

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4. *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (march against school segregation); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (wearing black armbands in protest against government policy); *Hughes v. Superior Court of California*, 339 U.S. 460 (1960) (picketing); *Stromberg v. California*, 283 U.S. 359 (19) (display of flag); and see *United States v. O'Brien*, 368 U.S. 367 (1968) (draft card burning) wherein it was *assumed* that the purported communicative element of O'Brien's conduct (protest against war and draft) was sufficient to bring the First Amendment into play. 391 U.S. at 376.

5. And see *Cowgill v. California*, 396 U.S. 371 (1970) (wearing cut-up or mutilated flag), and the *dissenting opinions* in *Street v. New York*, 394 U.S. 576, 594-617 (1969) (flag burning), wherein the majority of this Court reversed the conviction on the basis that it was impossible to tell from the record if the conviction was solely for the non-verbal act of flag burning or included the words spoken by the defendant at the time he burned the flag.

Likewise, recognition that communication of ideas by means of motion pictures is within the freedom of speech guarantee, *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502-503 (1952), does not, and should not mean that *anything* visually reproduced on film is automatically "speech" and within First Amendment protection. It is the expression or communication of ideas which the First Amendment protects, not the media by which the ideas are transmitted. Blank film itself does not have First Amendment protection. It is incongruous that if the "live" visual display of certain non-verbal acts and conduct is not entitled to First Amendment protection, that a visual reproduction of the very same acts and conduct by means of film achieves such protection.

Without attempting to speculate as to what, *if any,* idea or protest the person exposing his or her genitalia or anus, or the persons engaging in acts of sodomy, oral copulation, masturbation, or bestiality, are attempting to express to the public—or what, *if any,* idea or protest is being expressed to the public if such acts and conduct are visually reproduced on film—it is submitted that such *non-verbal* acts and conduct have no intrinsic or clearly recognizable and significant communicative or "symbolic speech" element entitling them to First Amendment protection. *Cox v. Louisiana,* 379 U.S. 559, 562-564 (1965); *Cowgill v. California,* 396 U.S. 371, 371-372 (1970); and see *Derrington v. City of Portland,* 451 P.2d 111 (Ore.), certiorari denied 396 U.S. 901 (1969).

II. Assuming, Arguendo, That the Non-Verbal Acts and Conduct, and/or the Visual Reproductions Thereof, Are Within First Amendment Protection, a Federal Court May Not Require a State to Restrict Itself to Obscenity as the Only Basis for Regulation of Such Acts, Conduct and Displays. A State May Regulate and Limit First Amendment Activity on Non-Obscenity Grounds Provided the State's Regulations Meet the Criteria Set Down in United States v. O'Brien, 391 U.S. 367, 376-377 (1968)

Even *if* the non-verbal acts and conduct, and/or the visual displays thereof, have a "speech" element entitling them initially to First and Fourteenth Amendment protection, or even *if* they are found to be inseparably woven into other non-proscribed activities having such protection, the regulations are nonetheless valid as they embody important state interests which clearly outweigh any incidental limitation on such non-verbal, commercial conduct.[6]

The District Court majority took the position that such non-verbal acts, conduct and visual reproductions (films) may be regulated by the State *only* if they are *obscene*, and that the regulations are therefore invalid because they do not concern themselves with *obscenity* and do not require the standards of proof as to *obscenity*. (App.)

Such a legal posture by the District Court majority is clearly erroneous. *Obscenity* is not the only basis upon which a State may regulate or limit First Amendment activity. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950) and *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950) (picketing); *Beauharnis v. Illinois*, 343 U.S. 250 (1952) (libel); *United States v. Harris*,

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6. See *Derrington v. City of Portland*, 451 P.2d 111, 113 (Ore.), certiorari denied 396 U.S. 901 (1969):

> "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."

347 U.S. 612 (1954) (lobbying); *Breard v. Alexandria,* 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (sound trucks); *United States v. O'Brien,* 391 U.S. 367 (1968) (draft card burning); and see *Adderley v. Florida,* 385 U.S. 39, 47-48 (1966), and *Purity Extract Co. v. Lynch,* 226 U.S. 192, 201 (1912).

The District Court majority relies on *Roth v. United States,* 354 U.S. 476 (1957), and its progeny. But *Roth* was a criminal *obscenity* case which established that *obscenity* is not afforded First Amendment protection. *Roth* and the subsequent decisions of this Court relating thereto, have dealt with what standards of proof are to be used in determining or establishing *obscenity.* The instant State regulations however do not deal with *obscenity.* In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to the public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages.

This Court clearly set forth in *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968) that:

> "... This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we thing it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the inciden-

tal restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Hence, a State may regulate and limit First Amendment activity on non-obscenity grounds so long as the regulations meet the *O'Brien* criteria.

III. Assuming, Arguendo, That the Non-Verbal Acts and Conduct, and/or the Visual Reproductions Thereof, Are Within First Amendment Protection, the Instant Regulations Embody Important State Interests Which Justify the Limitations Against An On-Sale Alcoholic Beverages License Being Held on Premises Where Such Acts, Conduct and Visual Displays Are Employed or Permitted. The Regulations Clearly Meet the Criteria of United States v. O'Brien, 391 U.S. 367, 376-377 (1968)

United States v. O'Brien, 391 U.S. 367, 376-377 (1968) specifies that a regulation limiting First Amendment freedoms is sufficiently justified:

> "... if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The regulations invalidated and enjoined by the court below clearly meet all of the *O'Brien* criteria.

A. REGULATION AND CONTROL OF THE CONDITIONS SURROUNDING THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS WITHIN THE CONSTITUTIONAL POWER OF THE STATE

Both traditionally and under the Twenty-first Amendment, a state has broad power to regulate and control the conditions surrounding the sale, use, distribution and consumption of alcoholic beverages within its borders. *United States Constitution, Twenty-first Amendment; Seagram v.*

Hostetter, 384 U.S. 35, 41-43 (1966) *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 330 (1964); *California v. Washington,* 358 U.S. 64 (1958); *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890). This Court has recently *refused* to review California alcoholic beverage control disciplinary cases where the alcoholic beverages licenses have attempted to raise First Amendment contentions in connection with *non-verbal* sexual conduct or displays on state licensed alcoholic beverages premises. *Meacham dba "Barbary Coast" v. California Department of Alcoholic Beverage Control,* 393 U.S. 855 (1968); *Probro, Inc. v. Department of Alcoholic Beverage Control of California,* 392 U.S. 855 (1968); *Keller v. California Department of Alcoholic Beverage Control,* 400 U.S. 806 (1970); and see *Derrington v. City of Portland,* (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

B. IMPORTANT AND SUBSTANTIAL STATE INTERESTS ARE INVOLVED IN THE PREVENTION AT STATE LICENSED ON-SALE ALCOHOLIC BEVERAGES PREMISES OF: IMPROPER AND UNLAWFUL CONDUCT BY EMPLOYEES AND BETWEEN EMPLOYEES AND CUSTOMERS; "B-GIRL" ACTIVITY; PROSTITUTION; NARCOTIC AND DANGEROUS DRUG OFFENSES; VIOLENT CRIMES; EXPLOITATION OF THE CUSTOMERS; OVERT SEX OFFENSES; INTEMPERANCE; PRESENCE OF MINORS; ASSAULTS ON POLICE OFFICERS; AND OTHER SERIOUS AND EXTENSIVE LAW ENFORCEMENT PROBLEMS

Regulation and control over the conditions surrounding the sale and service of alcoholic beverages in California is statutorily declared by the California Legislature to involve "an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State," and "involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people."[7]

The importance of alcoholic beverage control in California is further evidenced by the people's direct establish-

7. Section 23001, Calif. Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code).

ment of the California Department of Alcoholic Beverage Control in the California Constitution and the self-executing, direct constitutional grant of power from the people of California to the Department of Alcoholic Beverage Control to suspend or revoke alcoholic beverages licenses upon the Department's determination that continuance of the licenses would be contrary to the public welfare or morals.[8]

Also pertinent to the instant case are the following California alcoholic beverage control statutes:

Section 23958 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) which provides as to alcoholic beverages licenses that the Department of Alcoholic Beverage Control shall investigate all matters which may affect public welfare and morals and which specifically sets forth:

> "The department further may deny an application for a license if issuance of such license would tend to create a law enforcement problem, . . ."

Sections 24200.5(a) and (b) of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) *mandate* revocation of an alcoholic beverages license for either sale of narcotics or dangerous drugs on licensed premises (§ 24200.5(a)) or the employing or permitting of persons to solicit or encourage others, directly or indirectly, to buy them drinks on the licensed premises—"B-girl" activity (§ 24200.5(b)).

Section 25601 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) prohibits the suffering or use of licensed premises as a "disorderly house

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8. California Constitution, Article XX, Section 22. The constitutional grant of power to the Department is further augmented by an identical statutory grant of power to the Department from the California Legislature. California Alcoholic Beverage Control Act, Sections 24200(a) and 25750 (Div. 9, Calif. Bus. & Prof. Code).

or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, ..."

Section 25657 of the California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) makes it unlawful to employ any hostess or entertainer for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages.

So-called "B-girl" activity is also made unlawful by Section 303 of the California Penal Code. Likewise, many of the proscribed acts and conduct such as sodomy, oral copulation, et cetera, are violations of the California Penal Code.

Lastly, but not necessarily all inclusive, we would point to section 25665 of the California Alcoholic Beverage Control Act which prohibits persons under 21 years of age being on on-sale *public premises,* that is, on licensed premises which are not also bona fide restaurants. If only a bar, minors are allowed on the premises *if* they have lawful business thereon. Minors are permitted on bona fide eating premises.

Hence, it should be kept in mind that as to alcoholic beverages premises California constitutional and statutory provisions concern themselves with, among other things: public welfare, public morals, law enforcement problems, "B-girl" activity, narcotics, dangerous drugs, minors and promotion of temperance.

With reference then to the various facts shown in the legislative hearing record and exhibits (see the Statement of the Case, supra, pages 5-9), it is readily apparent that the activities attendant to and resulting from the employment of such sexually oriented acts, conduct and displays on on-sale alcoholic beverages premises are clearly contra to important State interests as to the conditions surround-

ing the sale and consumption of alcoholic beverages on state licensed alcoholic beverages premises.

The instant regulations further substantiate State interests by preventing the employment and use of such conduct and displays on on-sale alcoholic beverages premises, thereby removing the catalysts which, when added to the sale and consumption of alcoholic beverages, induce and produce such adverse results. In such an important and sensitive area as alcoholic beverage control, the State should not be required to have to wait and allow the resultant injurious activities to occur and then discipline the alcoholic beverages licensee only after the harm to the California public has already occurred.

C. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL'S INTERESTS ARE UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION

The regulations proscribe permitting certain non-verbal acts, conduct and visual displays on on-sale alcoholic beverages premises. The purpose of the regulations is to prevent the attendant and resulting injuries to the State's interests which experience has shown are induced when such conduct and displays are mixed with customers who are consuming alcoholic beverages.

Furthermore, the proscribed non-verbal acts and conduct, and the visual displays thereof, have no recognized symbolic speech element.

D. THE REGULATIONS PROSCRIBE PERMITTING CERTAIN SPECIFIED NON-VERBAL ACTS AND CONDUCT, AND THE VISUAL DISPLAYS THEREOF, ON ON-SALE ALCOHOLIC BEVERAGES PREMISES. SUCH RESTRICTIONS ARE NO GREATER THAN THOSE ESSENTIAL TO FURTHER THE STATE'S INTERESTS

The regulations confine themselves to specified non-verbal acts and conduct, and the visual displays thereof, on on-sale alcoholic beverages premises.

The regulations do not embody a blanket proscription against dancing, motion pictures or other forms of entertainment; nor do they concern themselves with the employ-

ment, use or display of such acts, conduct and visual reproductions on any premises in the State other than an on-sale alcoholic beverages premises.

IV. A Federal Court May Not Invalidate and Enjoin Otherwise Valid State Regulations by Assuming That Improper Motives Prompted Such Enactments

Selecting limited excerpts from various statements in the legislative hearing record, the majority of the District Court *assumed* that the motive behind the enactment of the regulations was not to deter the consequences set forth by the Department but rather to circumvent *obscenity* proof requirements. (App.)

Reliance on such a basis for invalidation of State regulations is contra to the well established rule that the courts may not defeat otherwise valid enactments by assuming that improper motives prompted such enactments. *United States v. O'Brien,* 391 U.S. 367, 383 (1968); *Palmer v. Thompson,* 398 U.S. 948 (1970); *Barenblatt v. United States,* 360 U.S. 109, 132 (1959).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below enjoining the enforcement of California Department of Alcoholic Beverage Control Regulations 143.3 and 143.4 should be reversed.

Dated: February 14, 1972

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(Appendix follows)

Appendix

California Department of Alcoholic Beverage Control Regulations 143.2, 143.3, 143.4 and 143.5 (Title 4, California Administrative Code, §§ 143.2, 143.3, 143.4 and 143.5) were enacted and filed with the California Secretary of State (Register 70, No. 28) on July 9, 1970.

"143.2. Attire and Conduct. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

(1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast, below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.3. Entertainers and Conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumsances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.4. Visual Displays. The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(3) Scenes wherein a person displays the vulva or the anus or the genitals.

(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

143.5. Ordinances. Notwithstanding any of the provisions of Rules 143.2, 143.3 and 143.4, no on-sale licensee shall employ, use the services of, or permit upon his licensed premises, any entertainment or person so attired as to be in violation of any city or county ordinance."